A **BRUNEI REPORT**

Zainuddin Dato Seri Paduka Haji Marsal v Pengiran Putera Negara Pengiran Haji Umar & Anor

B HIGH COURT (BRUNEI) — SUIT NO 40 OF 1994
RG PENLINGTON C
20 APRIL 1996

Civil Procedure *— Writ of summons — Striking out — Wrong procedure followed — Challenging validity of decision made by public officer — Whether such action should*
C *commence by public law proceedings instead of proceedings in private law*

Evidence *— Privilege — Information relating to arrest and detention — Certificate given by a minister stating that disclosure contrary to public interest — Whether courts can question the decision of the minister*

D ***Limitation*** *— False imprisonment — When should time run — Whether detainee was under 'disability' during detention — Whether relevant limitation period was one year or six years — Emergency (Limitation) Order 1991 s 6(1) — Limitation Act 1967*

Limitation *— Negligence — Action for negligence during preventive detention — When should time run — Whether detainee was under 'disability' during detention*

E

Limitation *— Extension of limitation period — Discretion — Whether equitable to allow action to proceed — Whether defendants would suffer prejudice — Emergency (Limitation) Order 1991 s 40*

Preventive Detention *— Detention order — Whether detainee informed of grounds*
F *of arrest — Whether there was a requirement to furnish grounds of detention — Whether detention was lawful*

The plaintiff was arrested on 20 August 1986 under O 19 of the Emergency Orders 1962 ('the EO 1962'). Following his arrest the
G plaintiff was searched. Nothing incriminating was found and he was then taken to the headquarters of the Royal Brunei Police Force ('the RBPF') where he was detained. The plaintiff alleged that he was not told of the reasons for his detention and was not served with any written order of detention. He was not brought before any court and
H was not allowed to obtain legal advice or to contact members of his family. The plaintiff also alleged that he was detained under very oppressive conditions. The plaintiff remained at the police headquarters until 28 December 1987 whereby he was then moved to the Jerudong Detention Centre. This was done pursuant to an order signed by the Minister of Home Affairs ('D3') under O 8 of the
I EO 1962. The plaintiff remained at the Jerudong Detention Centre until 11 December 1988 when an order was made by D3 under s 3 of the Internal Security Act 1982. The order was served on the plaintiff on 9 February 1989. The final period under which the

plaintiff was under restriction on his movements was from 11 April 1989 until 11 April 1990 when the plaintiff, although released from the Jerudong Detention Centre, was served with a restricted movement order made by the Deputy Minister of Home Affairs. The plaintiff stated that at no time during his entire period of detention or restriction was he ever told of the reasons for it, even in broad terms. A certificate had been filed purporting to be signed by D3 in his capacity as Minister of Home Affairs to the effect that he considered that the disclosure of any information leading to the arrest or detention of the plaintiff and events thereafter would be injurious to the public interest in that it would constitute a threat to the national security of Brunei. The plaintiff filed his statement of claim against the defendants on 5 May 1994. In his amended statement of claim filed in March 1995, the plaintiff claimed damages for (i) false imprisonment; (ii) assault and battery; and (iii) negligence. In August 1995 the defendants filed an application to strike out the claim. It was argued for all the defendants that the plaintiff's claim was a challenge against the validity of decisions made by public officers acting in their official capacity. That was an issue of public law and should be challenged by public law proceedings, not by a private law writ claiming damages. The defendants also contended that the plaintiff's claim was statute-barred. The senior registrar allowed the defendants' application to strike out the plaintiff's statement of claim. At the appeal stage the defendants raised a fresh argument that the Limitation Act 1967 ('the LA 1967') provided that an action for false imprisonment was time-barred after one year from the date of release from the alleged false imprisonment. The plaintiff contended that the action, commenced after the Emergency (Limitation) Order 1991 ('the ELO 1991') came into force, was governed by the ELO 1991, s 6(1) of which provided that the period of limitation for claims founded in tort was six years. The plaintiff also argued that under s 40 of the the ELO 1991 the limitation period for the personal injuries claim should be extended in the discretion of the court. The plaintiff here said that there would be no substantial prejudice to the defendants by allowing his action to proceed and that the reasons for the delay were substantially that he did not have funds, he could not obtain legal advice or assistance in Brunei and he wanted to be assured that the proposed action would not offend His Majesty The Sultan.

Held, dismissing the appeal:

(1) As far as the defendants' application to strike out the statement of claim was concerned, that should not be done unless on the facts as alleged by the plaintiff, his claim could not succeed in the light of the relevant law. Striking out a claim on the grounds that it was frivolous, vexatious or an abuse of process was only to be done in 'plain and obvious cases'. It was arguable that the procedure the plaintiff had followed in suing for damages in tort was, on the evidence so far produced, appropriate and he was

not obliged to challenge the detention orders by public law proceedings which, it seemed, would have required a separate action. The plaintiff clearly had an arguable case on this point and such case should not be struck out (see pp 145H–146B).

(2) There were two categories of documents which the executive might refuse to disclose, the first related to disclosure of the contents of that document which would be contrary to the public interest and the second was where the documents belonged to a class in which its contents ought to be withheld. It would be very rare in which a court could properly question the decision of a responsible minister that it would be contrary to the public interest to disclose the contents of a particular document. The effect of that was that, documents or information relevant to the reasons for the plaintiff's arrest and detention would not be produced or made available, and when the pleadings referred to further particulars of the claim against various defendants being given 'following discovery and interrogatories', they must be regarded in that light (see pp 147H–148D) *Conway v Rimmer* [1968] AC 910 followed.

(3) There was no requirement in the EO 1962 for a person arrested and detained to be informed of the reasons for such arrest and detention. The detention orders therefore were valid (see p 149D).

(4) The claim made against D1 and D2 for false imprisonment could not succeed and should be struck out. There was a burden on the plaintiff to raise some ground or grounds which, if proved, would make the order invalid. There was no requirement that the order should state the reasons for the detention. The detention orders must be considered valid (see pp 149I–150A).

(5) A defence of limitation should not form the basis for an application to strike out unless it was 'a very clear case'. If it was not such a clear case the defendant could plead and let the matter go to trial or seek the hearing of the question of limitation as a preliminary issue (see 153D–E); *Ronex Properties Ltd v John Laing Construction Ltd* [1983] QB 398 followed.

(6) Limitation to actions for false imprisonment, should run from the time when the wrongful imprisonment ended. The issues of aggregation of the periods of detention and whether the plaintiff was under a 'disability' while being in detention, so as to determine when time began to run for limitation purposes, were arguable (see p 154A–B). However, the claim for false imprisonment was clearly time-barred. The LA 1967 provided that an action for false imprisonment was time-barred after one year from the date of release from the alleged false imprisonment. The action was thus barred one year after the plaintiff's release on 11 April 1989. The ELO 1991 which provided for a longer limitation period could not be construed to say that the rights of action which were time-barred before the ELO 1991 came into force should be revived (see p 154G–I).

(7) Under s 40 of the ELO 1991, which applied only to actions for personal injuries, the court might extend the limitation period in any case if it considered it would be equitable to allow the action to proceed, having regard to the degree to which ss 15 and 16 of the ELO 1991 would prejudice the plaintiff. The court must also consider any prejudice the defendants would suffer by allowing the action to proceed. In this case, the claim was filed long after the causes of action arose. The reasons advanced to explain the delay were not sufficient to over-ride the inevitable prejudice to the defendants (see p 159G–I).

(8) An action for negligence must be brought within three years of the cause of action arising. The claim based on negligence in this case was time-barred three years from the date of the plaintiff's release. Allegations made against the defendants that they caused the plaintiff to suffer personal injuries either deliberately or through neglect of their duty was statute-barred by s 15 of the ELO 1991 and could not succeed. Therefore the plaintiff's claim in negligence failed (see p 158E–G).

Notes

For cases on striking out writ of summons, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 3714.

For a case on disclosure of confidential information, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) para 1392.

For cases on extension of limitation period, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1834–1835.

For a case on failure to furnish grounds of arrest and detention, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) para 1204.

Cases referred to

Aldrich v Duke [1686] Comd 26 GO ER 322 (refd)
Arnold v Central Electricity Generating Board [1987] 3 All ER 694 (refd)
Conway v Rimmer [1968] AC 910 (folld)
Dillon v R [1982] AC 484 (refd)
Duncan v Cammell, Laird and Co Ltd [1942] AC 624 (refd)
Duncan v London Borough of Lambeth [1968] All ER 84 (refd)
Dyson v A-G [1910] 1 KB 410 (refd)
Elguzouli-Daf v Commissioner of Police & Anor [1995] 1 All ER 833 (refd)
Evans v Bartlam [1937] AC 473 (refd)
Fisher v Pearce [1885] ILR G Dom 1(refd)
Hawkins v Clayton (1988) 164 CLR 539 (refd)
Hill v Chief Constable of West Yorkshire [1989] AC 53 (refd)
Ketteman v Hansel Properties Ltd [1987] AC 189 (refd)
Kirby v Leather [1965] 2 All ER 441 (refd)
Lawrance v Lord Norreys (1890) 15 App Cas 210 (refd)

Metal Industries Ltd v Gensen [1989] 1 NZLR 525 (refd)
O'Reilly v Mackman [1983] 2 AC 237 (not folld)
Paul D Harrison and Sons [1994] BCC 495 (refd)
Pilmore v Northern Trawlers Ltd [1986] 1 Lloyd's Rep 552 (refd)
Polemis, Re [1921] 3 KB 560 (refd)
R v IRC, ex p Rossminster [1980] AC 952 (distd)
R v Home Secretary, ex p Khawaja [1984] 1 AC 76 (refd)
Ronex Properties Ltd v John Laing Construction Ltd [1983] QB 398 (folld)
Roy v Kensington and Chelsea and Westminster Family Practitioner Committee [1992] 2 WLR 239 (refd)
Salleh bin Hj Ali Hassan v PP [1987] 1 MLJ 522 (refd)
Scott v R [1986] 3 CF 403 (refd)
Schlieske v Fed Republic of Germany (1987) 71 ALR 214 (refd)
T v H [1995] 3 NZLR 37 (refd)
Wagon Mound, The [1961] AC 388 (refd)
Wenlock v Moloney [1965] 1 WLR 1238 (folld)
Yew Bon Tew v Kenderaan Bas Mara [1982] 3 All ER 833 (refd)

Legislation referred to

Constitution of Brunei art 83(3)
Constitution (Transfer of Function and Consequential Provisions) Order 1987 [Brunei]
Criminal Procedure Code [Brunei] ss 341, 342
Emergency Orders 1962 [Brunei] O 8, O 19
Emergency (Detention Orders) Rules 1962 [Brunei] r 3
Emergency (Limitation) Order 1991 [Brunei] ss 2, 4, 6, 15, 16, 32, 40
High Court (Civil Procedure) Rules [Brunei] O 24, O53
Internal Security Act 1982 [Brunei] ss 3, 4, 66
Interpretation and General Clauses Act (Cap 4) [Brunei] s 10
Limitation Act 1967 [Brunei] s 38
Prison Rules 1979 [Brunei]
Prison Act [Brunei]
Rules of Supreme Court [UK] O 18, O 20

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Cur Adv Vult

RG Penlington C:

Background

The hearing of this matter was from 5–7 March 1996. At the conclusion of the oral argument, as there was a further ground of appeal raised by the defendants at a late stage, further written argument was filed, the last of which was received on 15 April 1996.

This is an appeal from a decision of the senior registrar ('the SR') Rokiah Swed, dated 30 September 1995 in which she refused the plaintiff leave to amend his statement of claim and to add six further defendants but allowed the first and second defendants' ('D1 and D2') application to strike out the statement of claim as being 'frivolous, vexatious and an abuse of the process of the court'. A B

The applications were fully argued before the SR and she had the benefit and assistance, as I also have had, of submissions from leading counsel of great experience on both sides.

The SR's decision is detailed and she has set out very fully the relevant background evidence and the legal submissions made to her. This has been of great assistance to me. This appeal however is by way of re-hearing and while I should naturally have regard to the SR's decision, I must hear the appeal as one of first instance (see *Evans v Bartlam* [1937] AC 473, per Lord Atkin at p 478). C

There are other principles which I must also bear in mind in considering this appeal. The first is that I should not try to decide disputed matters of fact. Affidavits have been sworn by the plaintiff and his wife in support of his application. I was informed that affidavits are available on behalf of the defendants in reply, although, apart from that of Mr David Clidero, I have not seen them as they were only filed very shortly before the hearing. In *Wenlock v Moloney* [1965] 1 WLR 1238 Danckwerts LJ, in considering an appeal from a master's decision that, on the affidavits filed, the plaintiff's claim was 'very unlikely to succeed' and should be struck out, said that the inherent jurisdiction referred to by Lord Herschel in *Lawrance v Lord Norreys* (1890) 15 App Cas 210 is now incorporated in the UK Rules of the Supreme Court ('the RSC') O 18 r 19, but the principle remains. He went on: D E F

> ... but this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case in order to see if the plaintiff really has a cause of action. That is to usurp the function of the trial judge and to produce a trial of the action in chambers on affidavits only and without oral evidence tested by cross-examination in the ordinary way. This seems to be an abuse of the inherent power of the court and not a proper exercise of that power. G

Seller LJ delivered a similar judgment and Diplock LJ agreed. That principle, I have no doubt, governs an application to strike out a claim in Brunei. The court should simply look at the plaintiff's affidavit evidence and proceed on the basis that, unless so improbable on its face as to defy belief, that evidence will be accepted by the trial judge. H

Another important principle which has been rightly stressed by leading counsel for the plaintiff is that, not only should the court avoid trying to decide what are contested matters of fact but as far as the defendants' application to strike out the statement of claim is concerned, that should not be done unless on the facts as alleged by the plaintiff, his claim *cannot* succeed in the light of the relevant law. Striking out a claim on the grounds that it is frivolous, vexatious or an abuse of process is only to be done in 'plain and obvious cases'. In *Dyson v A-G* [1910] 1 KB 410 Fletcher-Moulton LJ said at p 419: I

> To my mind it is evident that our judicial system would never permit a plaintiff to be 'driven from the judgment seat' in this way without the court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad.

As regards the defence of limitation the plaintiff relies on *Ronex Properties Ltd v John Laing Construction Ltd* [1983] QB 398 where Donaldson LJ stated at p 405:

> ... where it is thought to be clear that there is a defence under the limitation acts the defendant can either plead that defence and seek the trial of a preliminary issue or in a very clear case he can seek to strike out the claim on the grounds that it is frivolous, vexatious and an abuse of the process of the court and support his application with evidence. But under no circumstances can he seek to strike out on the ground that no cause of action is disclosed.

The plaintiff argues that in this case there are several issues which are clearly at any rate arguable — it is far from being a 'clear case'.

The plaintiff's claim

The plaintiff, in his statement of claim dated 5 May 1994 which was filed in person on that day, says that he was a businessman in Brunei engaged in managing family property, a car rental firm and he was also an agent for European jewellery designers on whose behalf he sold jewellery, inter alia, to members of the Brunei Royal Family.

On 14 August 1986 the plaintiff left Brunei for Singapore but in doing so apparently had some form of dispute with a police officer at the airport. On 19 August 1986 he sent a complaint to the first defendant, in his capacity as Commissioner of Police, by telex, relating this incident and on the following day, he received a telex asking him to assist in an investigation when he returned to Brunei. It is not clear from the original pleadings whether it is suggested that this incident resulted in the plaintiff's subsequent arrest and detention.

It is not in dispute that the plaintiff arrived at the Brunei International Airport on 20 August 1986 where he was arrested by D2, acting on the instruction of D1, who was then the Commissioner of the Royal Brunei Police Force ('the RBPF'). The second defendant was the Assistant Commissioner of Police. D2 was acting under O 19 of the Emergency Orders 1962 ('the EO 1962').

Following his arrest, the plaintiff was searched. Nothing incriminating was found and he was then taken to the headquarters of the RBPF where he was detained by D2, again acting on the instructions of D1. The plaintiff says he was not told of the reasons for his detention and was not served with any written order of detention. He was not brought before any court, was not allowed to obtain legal advice, nor contact members of his family. The plaintiff further avers that he was detained in a small cell which was poorly ventilated. To add to his discomfort he complained that D1 and D2 instructed the guards to blow smoke under the door of the cell. It is also claimed that the plaintiff, despite banging on the door of the cell

and shouting, was not allowed to leave his cell to go to the toilet. Tape was also put round the cell door, increasing the poor ventilation. A

During this first period of detention which lasted until 28 December 1987 the plaintiff claimed he suffered ill health due to the treatment he had received and he was hospitalized on 25 August 1986 for a period of 14 days. He was almost immediately re-admitted on 9 September 1986 for a further 10 days. The plaintiff seeks to join the fifth defendant ('D5'), ie the officer of the RBPF who was in charge of the detention cells at the police headquarters, as also being responsible for his detention there and seeks damages for the treatment he received. B

The plaintiff claims that on 9 October 1986 as a result of being told by the police officer in charge of the detention cells at the police headquarters (whom it is sought to join as the eighth defendant ('D8')) that he would be detained for about 20 to 30 years, the plaintiff escaped from the police headquarters but was re-arrested the following day by the proposed seventh defendant ('D7') who was then the Assistant Commissioner of the RBPF in charge of police operations. During the course of that escape and re-arrest, the plaintiff alleges he suffered severe injuries including a compression fracture of his back which caused him great pain which still continues, at least partially. The plaintiff was hospitalized as a result of the injuries he received during his escape and re-arrest and says that during that hospitalization he was handcuffed tightly, causing injury to his wrists. C D E

After his re-arrest, the plaintiff was returned to the police headquarters where he remained until 28 December 1987, when he was moved to the Jerudong Detention Centre. That was done pursuant to an order signed by the Minister of Home Affairs, whom the plaintiff seeks to join as the third defendant ('D3') under O 8 of the EO 1962. Initially a challenge was mounted by the plaintiff as to the validity of those emergency orders, on the basis that there are no grounds upon which His Majesty The Sultan could still be satisfied that a state of emergency exists in Brunei, and therefore such orders have lapsed. There is a great volume of authority to show that the courts will not attempt to interfere with the decision of the executive arm on such matter, including a very recent decision of the Supreme Court of Singapore. That claim however has now been abandoned. F G

The plaintiff remained at the Jerudong Detention Centre pursuant to the order under the EO 1962 until 11 December 1988 when an order was made by D3 under s 3 of the Internal Security Act 1982 ('the ISA 1982'). That order was served on the plaintiff on 9 February 1989. H

The final period under which the plaintiff was under a restriction on his movements was from 11 April 1989 to 11 April 1990 when the plaintiff, although released from the Jerudong Detention Centre, was served with a restricted movement order made by the then Deputy Minister of Home Affairs, whom the plaintiff seeks to also add as the fourth defendant ('D4') which, inter alia, forbade him leaving his house between 10pm and 6am each day. It also required him to obtain permission before leaving Brunei or the Brunei/Muara District. I

A The plaintiff says that at no time during his entire period of detention or restriction was he ever told of the reasons for it, even in broad terms. The defendants say he was told that he was considered a risk to the security of Brunei.

After his release from detention, the plaintiff claims that he tried to B obtain legal advice, such being denied him previously, but encountered great difficulty in Brunei as it was considered by the various lawyers he consulted, that his claim of false imprisonment was politically sensitive and they were not prepared to act for him. He himself was conscious of this aspect and although he says he was told by a sister-in-law of His Majesty The Sultan that His Majesty was not personally aware of the C detention orders and it had nothing to do with them, he was reluctant to take legal proceedings until he was sure it would not give offence. To that end he wrote to His Majesty with copies of various documents concerning his proposed action. He received a reply which, not surprisingly, simply said it was a matter entirely for him as to whether or not he took such D action. The plaintiff however apparently took this letter as encouraging and, with the help of friends outside Brunei, he prepared a writ and statement of claim against D1 and D2 which was filed on 5 May 1994. The other reason given by the plaintiff for the delay in taking proceedings following his release and the removal of the restriction order was that he had no money to fund a legal action, not having earned anything while in E detention and having lost two lucrative agencies because of it. However he did threaten to sue for libel in Singapore concerning a book entitled *The Richest Man in the World* in which he was mentioned and certain allegations made about him and his associates. That claim was settled and he then had funds to finance this claim.

F *The pleadings*

Following service of the writ and statement of claim on D2 and D1 (who was by then in Singapore) appearances and statements of defence were filed. The plaintiff in turn filed replies and also a request for further and G better particulars of D2's defence, which were supplied. The plaintiff then sought leave to amend the statement of claim so as to add a claim for assault and battery and to join D3–D8 as defendants in respect of their various roles in his detention (the proposed amended statement of claim is referred to as 'the PASC'). That was in March 1995. In August 1995 the defendants filed an application to strike out the claim. A complaint was H made by the plaintiff that an application to strike out should have been made promptly which was not done. A similar complaint was made by D3–D8 that the application to join them was filed at a very late stage.

All applications came before the SR in August 1995. There were various other matters such as an application to serve interrogatories on the I honourable Minister of Law and on the Deputy Senior Crown Counsel who raised interesting points as to whether a person who is not a party to proceedings, could be made to reply to interrogatories — but these were not proceeded with and neither was the application for further and better

particulars of the defences of D1 and D2. A challenge to the validity of the Emergency (Limitation) Order 1991 ('the ELO 1991') was abandoned and as a consequence so was the application to amend the defences so as to plead the defence of limitation as contained in the Limitation Act 1967 ('the LA') which would have prevailed if the ELO 1991 was invalid.

At the hearing before the SR, an allegation contained in paras 13 and 14 of the original statement of claim alleging that there had been a conspiracy between D1 and D2, inspired by malice, to mislead D3 that the plaintiff had acted in a manner prejudicial to the State of Brunei, was also abandoned.

The claims brought by the plaintiff, as contained in the PASC are as follows:

(a) false imprisonment (paras 1–39 of the PASC);

(b) assault and battery (paras 1–38 of the PASC);

(c) negligence (paras 46–48 of the PASC).

Before the hearing, a claim for misfeasance in public office against all defendants (para 46 of the PASC) was also abandoned.

Amendment of the statement of claim

The plaintiff contends that the principle is clear that at any stage he should be allowed to amend his statement of claim if such is necessary to decide the issues between the parties and that additional parties may be added if that is also necessary to decide those issues. Such an amendment should be allowed even if it prejudices the defendants provided they have an adequate remedy in costs. The relevant authorities are well known and are set out in the notes to O 20 r 8/6 in the White Book. The words of Lord Griffiths in *Ketteman v Hansel Properties Ltd* [1987] AC 189 are also relevant here in relation to the applications to amend by joining D3–D8. So far as D3 is concerned, for instance, it is now over eight years since he issued the detention order of 11 December 1987.

The defendants' application to strike out the statement of claim

The application to strike out is made on various grounds, some general to all defendants and some particular.

The O'Reilly v Mackman issue

It is argued for all the defendants that the plaintiff's claim is a challenge to the validity of decisions made by public officers acting in their official capacity. That is an issue of public law and should be challenged by public law proceedings, not by a private law writ claiming damages.

The dicta of Lord Diplock in *O'Reilly v Mackman* [1983] 2 AC 237, is relied on where his lordship states at p 285:

> ... It would, in my view, be contrary to public policy and as such an abuse of the process of the court to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to

> protection under public law, to proceed by way of an ordinary action and by this means, to evade the provisions of O 53 for the protection of such authorities.

Lord Diplock was upholding the decision of the Court of Appeal where Lord Denning had made similar remarks (*O'Reilly v Mackman* [1983] 2 AC 237 is remarkable for that alone). Lord Denning had said that the decision of prison visitors in their official capacity could not be challenged 'any more than that of a magistrate'. That however did not mean that nothing could be done. 'An unjust-judge or inferior court or tribunal is not free from control. Although he does not owe a duty to the prisoner or litigant, he does owe a duty to the state and the state can call him to account'.

Here, the defendants argue that the plaintiff should not be allowed to proceed in the way that he has and to simply bring a claim for damages for what is alleged to be a breach of public law rights. The plaintiff could and should have applied for certiorari to quash the detention orders or applied for a writ of habeas corpus. While there is no exact equivalent of O 53 in Brunei, preliminary r 2 of the Brunei High Court (Civil Procedure) Rules ('the HCR') provides that if there is no appropriate procedure in Brunei, the procedure in the RSC may be followed. The plaintiff could also have used ss 341 and 342 of the Criminal Procedure Code of Brunei ('the CPC') which, as Roberts CJ stated in *Salleh bin Hj Ali Hassan v PP* [1987] 1 MLJ 522, is a useful summary method of obtaining relief in the nature of habeas corpus. As the plaintiff has not sought to challenge the validity of the detention orders by the correct method, they must be considered valid and the plaintiffs's claim based on their invalidity must fail.

The plaintiff's case on this aspect is that *O'Reilly v Mackman* should be looked at on its own facts and he relies on more recent authority of *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 2 WLR 239 where Lord Bridge said:

> ... where a litigant asserts his entitlement to a subsisting right in private law, whether by claim or defence, the circumstance that the existence and extent of the private law right may incidentally involve the examination of a public law issue cannot prevent the litigant from seeking to establish his right of action commenced by writ or originating summons any more than it can prevent him from setting up his private law right in proceedings brought against him (see also *Davy v Spelthome Borough Council* [1984] AC 262 and the recent decision of *Mercury Communications Ltd v Director General of Communications* [1996] 1 WLR 48).

The SR upheld the defendant's contention on this point and ruled that the detention orders must be considered valid as they had not been challenged by public law proceedings. I find myself unable to agree. In the light of the authorities referred to me, at the very least the point is arguable, which is all the plaintiff has to show at this stage and that the procedure he has followed in suing for damages in tort is, on the evidence so far produced, appropriate. He was therefore not obliged to challenge the detention orders by public law, proceedings which, it seems, would have required a separate action. I consider that the plaintiff clearly has an arguable case on this point and such case should not be struck out because of it. The case

of *O'Reilly Mackman* is a very important decision on public law remedies but I consider that the courts in a different jurisdiction such as Brunei with different rules of procedure, should be reluctant to strike out a claim just because it may have offended what Lord Diplock said, except in a clear case. I do not consider this to be such a clear case. Nor do I consider that the plaintiff is barred from bringing this action because of his failure to utilise preliminary r 2 of the HCR.

The effect of the fourth detention period

It is the case for the plaintiff on the question of limitation, that the fourth detention period, from 11 April 1989 to 11 April 1990, when he was subject to restrictions as to his movements, should be treated in the same way as the previous periods when he was actually detained, ie that even though he had been released he was still under a 'disability'. Furthermore if the period of limitation for unlawful imprisonment runs from the date of release again, it should be taken from 11 April 1990, and not 1989. An authority on that point is sought from *R v Home Secretary, ex p Khawaja* [1984] 1 AC 76.

I do not consider that contention to be arguable. For the purposes of taking advice and bringing proceedings, I cannot see that the terms of the restriction order placed the plaintiff under any 'disability', even if that term does cover a period of detention. Similarly the authority cited for the proposition that a right of action for unlawful detention accrues when the detention ceases, refer to the actual release from that detention which in my view was clearly 11 April 1989.

The public interest immunity certificate ('the PIIC')

A certificate has been filed purporting to be signed by D3 in his capacity as Minister of Home Affairs to the effect that he considers that the disclosure of any information:

> ... leading to the arrest or detention of the plaintiff, including anything stated to the plaintiff at the time of his arrest and in the course of his detention relating to the reason for such arrest or detention or the circumstances leading thereto, would be injurious to the public interest in that it would constitute a threat to the national security of Brunei Darussalam and would be injurious to good diplomatic relations and would prejudice the well being of Brunei Darussalam.

D3 goes on to set out the reasons why it is important that Brunei, a small state but richly endowed with natural resources requires the powers of arrest and detention which are in existence and that reasons for arrest and detention may be prejudicial to the public interest, which he says is the position here.

It is the defendant's case that the plaintiff is, based on his own pleadings, unable to state why the detention orders are invalid but says he may be able to do so 'when discovery and interrogatories have taken place and been administered'. The defendants say that that argument is first of all a 'fishing expedition' and secondly the PIIC makes it clear that no

A further documents will in fact be provided. The defendants rely on the dicta of Vinelott J and Hoffman LJ in *Paul D Harrison and Sons* [1994] BCC 495. The plaintiff cannot be allowed to say 'I think the detention orders are invalid and, given discovery and interrogatories I hope I can prove it'. The plaintiff says that the PIIC is filed 'in terrorem' and should not be considered at this stage but only at the trial. Reliance is placed on B the dicta of Lord Diplock in *R v IRC, ex p Rossminster* [1980] AC 952, at p 1012. He considered the question of public interest immunity from disclosure by an officer for reasons for believing that a document which was seized during a raid on a tax-payer's premises, while conclusive, would come to an end either by a decision not to bring criminal proceedings or C by the conclusion of such proceedings, if brought. It is contended here that the arrest and detention of the plaintiff were, at any rate, quasi-criminal proceedings and, when that detention ended, any public interest question as to the reasons for the detention should have ended as well.

I do not accept that proposition. The facts here are very different to D those in *R v IRC, ex p Rossminster* where the claim for immunity was based on possible criminal proceedings which could be prejudiced by disclosure. When the criminal proceedings either fail to eventuate or conclude, the reason for the immunity has gone. That is simply not the case here.

I am satisfied that the PIIC is relevant to a consideration of whether the plaintiff has pleaded a case which might succeed and was properly so E considered by the SR.

The power of a member of the executive to refuse to disclose documents was exhaustively considered in *Conway v Rimmer* [1968] AC 910 in which the House of Lords reversed a decision of the Court of Appeal [1967] 1 WLR 1031, per Davies and Russell LJJ with Lord F Denning MR dissenting. That discussion was on the question of reports made about a probationary police inspector and a report on his behaviour made to the director of public prosecutions relating to a charge of theft of a fellow officer's electric torch. It eventually held that the court could and should look at such papers to see if a certificate signed by the secretary of G State for Home Affairs to the effect that disclosure of such documents would be contrary to the public interest should not be complied with. It is a leading decision on constitutional law involving opinions from such powerful judicial minds such as Lord Reid, Lord Morris, Lord Pearce and Lord Hodson, as well as the dissenting judgment below of Lord Denning. It is clear from *Conway v Rimmer* that there are two categories of documents H which the executive may refuse to disclose — the first relates to documents where the disclosure of the contents of such document would be contrary to the public interest and the second, as in *Conway v Rimmer*, relates to documents belonging to a class where its contents ought to be withheld (it was argued that a superior officer should not be concerned that a report he I was making might be disclosed which might make him less than frank). There was considerable debate as to the second category of documents and the House of Lords was required to go to the extreme length of refusing to be bound by its own earlier decision in *Duncan v Cammel, Laird*

and Co Ltd [1942] AC 624, but what was however never in doubt, A
although not fully argued, was that it would be very rare for a court to question the decision of a responsible minister that it would be contrary to the public interest to disclose the contents of a particular document. At p 957 Lord Reid said that:

> ... a court will always pay the greatest heed to a statement that production B
> of a document was not in the public interest and in most cases would be likely to give effect to it. There are many matters on which the executive will be more likely to be the best qualified to form a view.

When it comes to a question of national security it seems to me clear beyond question that the dicta in *Conway v Rimmer* although possibly an C
obiter dicta on the actual issue being considered, covers issues similar to those contined in the PIIC here and that certificate cannot be challenged. The effect of that, is that documents or information relevant to the reasons for the plaintiff's arrest and detention will not be produced or made available, and when the pleadings refer to further particulars of the claim against various defendants being given 'following discovery and D
interrogatories', they must be regarded in that light. This position is reflected in O 24 r 15 of the HCR, to which reference was made by the SR.

Validity of the detention orders

I now turn however to consider the case for the plaintiff as regards the E
validity of the detention orders made under the EO 1962 (the validity of which is not challenged now) and the order of 10 April 1989 under the provisions of ISA 1982 (the validity of which is not challenged now). It is claimed that O 8 and O 19 of the EO 1962 are invalid because they purport to allow imprisonment without trial, which is contrary to art 83(3) F
of the Constitution of Brunei.

I am satisfied that it is not arguable that detention under the EO 1962 is imprisonment without trial within the meaning of those words in art 83 of the Constitution of Brunei, upon which the validity of the EO 1962 is based (see *Wade on Administrative Law* (17th Ed) at p 336). Clause G
(3) of the article makes that abundantly clear when it specifically says that an order may be made for 'arrest, *detention*, exclusion and deportation'.

It is also claimed that the plaintiff was not informed of the grounds of his arrest and detention. There is, however, nothing in the order which requires that he has to be so informed, even in light of the provisions of the EO 1962 which provide for the right to lodge an objection to a detention H
order. It is further alleged that neither D1, D2, nor any member of the RBPF had any grounds for believing that the plaintiff should be detained under the order. Again there is no such requirement in the EO 1962. Even if D1 and D2 are still responsible for the continued detention of the plaintiff, so far as the second, third and fourth detention periods were I
concerned, they were acting pursuant to detention orders which were made by D3, the responsible minister. They were, on the face, valid orders and there is no ground pleaded which could result, in my view, in the orders being held to be invalid. This is particularly so in light of the contents of the PIIC.

A I am satisfied that for the purposes of these proceedings the detention orders must be considered as being valid.

The plaintiff's claim against D1 and D2 — Unlawful arrest and detention

The plaintiff's claim, as pleaded, is that he was unlawfully arrested at the B airport by D2 acting on the instructions of D1. He was then unlawfully detained at the police headquarters, Gadong until 28 December 1987, when the first detention order, signed on 11 December 1987, was served on him. The plaintiff was not informed of the reasons for his arrest or detention and that in any event D1 and D2 could not lawfully detain him C for more than 28 days under O 19 of the EO 1962 following his arrest without an order from D3 which was not obtained until 11 December 1987.

There is no requirement in the EO 1962 for a person arrested and detained to be informed of the reasons for such arrest and detention. It is however conceded by D1 and D2, for the purposes of these present D proceedings, that the plaintiff does have the basis for a claim for unlawful detention for the period after the expiry of 28 days from his arrest up to the making of the first detention order on 11 December 1987. The defence to that claim, at the moment, is one only of limitation.

It is the case for the plaintiff that notwithstanding the execution of E the first two detention orders by D3 and the restrictive movement order by D4, D1 and D2 remained liable for the detention of the plaintiff during the whole period of his detention and restriction.

It is submitted by the plaintiff that D1 and D2 cannot rely on the detention orders signed by D3 as they are invalid on the face of it. Reliance F is placed on *Dillon v R* [1982] AC 484 where is was stated that there is no presumption of lawful detention which a prisoner has to rebut. That decision was followed in *Schlieske v Fed Republic of Germany* (1987) 71 ALR 214.

The detention order of 11 December 1987 states that the plaintiff is to be detained at the Jerudong Detention Centre. He was not immediately G taken there but was detained, contrary to the order, at the police headquarters until 28 December 1987. The order was not served with the first detention order until 29 December 1987, contrary to the requirement in the EO 1962 that it has to be served as soon as possible. It is also invalid because the ER 1962 provides in r 3 that the 'authority' in charge of any H place of detention, shall as soon as possible after the arrival of a person detained under a detention order, inform him of his right to lodge an objection against the order to a committee of review.

I am satisfied that, irrespective of the PIIC, the claim made against D1 and D2 for false imprisonment following the making of the first I detention order on 28 December 1987 cannot succeed and should be struck out. D1 and D2 acknowledge that there is an onus on them to justify any detention and this they have done based on the detention order. There is then a burden on the plaintiff to raise some ground or grounds which, if proved, would make the order invalid. That he has failed to do.

There is no requirement that the order should state the reasons for the detention (indeed there is no requirement that the minister shall have any grounds for detention other than being informed that the detainee is required to be detained). The first order is directed to the officer in charge of the detention centre at Jerudong whereas the plaintiff was detained at the police headquarters in Gadong for some six weeks after the order was signed. Whether or not that gives rise to a claim for damages, it does not in my view, render the order invalid on the face of it. The same can be said for the fact that it was not served until 29 December 1987. There is an allegation that the ER 1962 were not complied in relation to the plaintiff being informed of his right to object to his detention. That again, while it may give rise to a cause of action, does not render the order invalid on the face of it.

In short, the plaintiff does have an arguable case as pleaded, for unlawful detention against D1 and D2 (subject to the limitation defence) for the period from 20 August 1986 to 11 December 1987 but not thereafter. After the later date there was a detention order in force and no arguable challenge to its validity has been raised in these proceedings.

The claim against D3 and D4

The basis of the claim against D3 and D4 are as set out in paras 4, 5, and 34(2)(a) to (h) of the PASC. These paragraphs state that D3, at all relevant times, was Minister for Home Affairs and D4 was his deputy. D3 was responsible for the operation and administration of prisons and the treatment of prisoners in Brunei and, from 27 June 1987, the operation of places of detention in Brunei and the control of persons therein contained. D4 was responsible as his deputy and who carried out the orders of D3. By the Prisons Rules 1979, D4 was required, at least once a year, to inspect all persons in Brunei and to report to D3. On 27 June 1987, responsibility for persons detained under the EO 1962 and the ISA 1982 were transferred to D3 by the Constitution of Brunei (Transfer of Function and Consequential Provisions) Order 1987. On 12 December 1987, D3 purported to make a detention order against the plaintiff pursuant to O 8 of the EO 1962. On 11 December 1988, D3 again purported to make a detention order against the plaintiff pursuant to s 3(1)(a) and s 66 of the ISA 1982 (which allows for detention of any person to prevent him from acting in any way prejudicial to the security of Brunei for a period of up to two years). On 10 April 1989, D4 directed the suspension of the detention order but subject to certain conditions pursuant to s 4 of the ISA 1982. The plaintiff again was unable to give any further particulars 'until after discovery and interrogatories are complete'.

For the reasons I have already given, I am satisfied that the plaintiff has not pleaded grounds which could succeed in challenging the validity of the detention orders and the allegation made in the PASC against them cannot support any claim for damages. The claim against D3 and D4, irrespective of any question of limitation, could not succeed and the amendment to join them should be refused.

The claim against D5

Particulars of the claim against D5 are set out in paras 28 and 34(3)(a)–(g) of the PASC. These sub-paragraphs state that the plaintiff was detained at the police headquarters from 20 August 1986 to 28 December 1987 during which time D5 was the police officer in charge. He was responsible for all persons detained at the headquarters, subject to the order of D1, D2, D3, D4 and D7, and was responsible for the immediate release of all persons unlawfully detained there, again subject to the order of D1, D2, D3, D4 and D7. D5 was required by the Prison Rules 1979 to interview the plaintiff upon his reception and prior to his discharge. He was also required to receive a report 'accounting' for all prisoners daily, presumably including the plaintiff. He was also responsible for keeping a prison record of each prisoner and 'other records and journals'. No particulars are given of any failure to comply with any of those requirements but again it is pleaded that further particulars cannot be given until after discovery and interrogatories are complete.

Paragraph 28 of the PASC says that the plaintiff was unlawfully taken from the police headquarters to the Jerudong Detention Centre by D5 or by officers acting under his direction, on 28 December 1987. I am satisfied that D5 was acting at that time pursuant to a detention order which was, on its face, valid and for the reasons I have given, such detention order cannot now be challenged. There remains however the detention of the plaintiff at the police headquarters from the period commencing 28 days after his first arrest under s 19 of the EO 1962 up to the time of the making of the first detention order by D3 on 11 December 1987 and D5 was arguably responsible, under s 3 of the ER 1962, which requires the person in charge of any place of detention to inform a person placed in detention of his right to object to his detention to a committee of review. Furthermore the detention order of 11 December 1987 authorized detention at the Jerudong Detention Centre, and not at the police headquarters and yet the plaintiff was not removed from there until 28 December 1987.

I am satisfied that, subject to the defence of limitation, the plaintiff has an arguable claim against D5 in his allegation that D5 did not have proper authority to detain the plaintiff after the expiry of 28 days from his arrest and for failure to comply with the detention rules. I also consider that there is, on the face of it, a claim for the period from 11–28 December 1987 as the first detention order specified detention at Jerudong and not at the police headquarters.

The claim against D6

D6 was the officer in charge of the Jerudong Detention Centre when the plaintiff was brought there, pursuant to the first detention order on 28 December 1987 and his continued detention there, pursuant to that order and the second detention order of 11 December 1988. It is claimed in the PASC that D6 had certain responsibilities, pursuant to the Prisons Act

and Prisons Rules 1979, which are set out. He is also said to have general responsibility for the supervision and control of all detainees and, subject to the orders of D3, D4 and D7, was responsible for the immediate release of all persons unlawfully detained at the centre. Again it is said that full particulars of the claim against D6 will be provided after discovery and interrogatories.

The detention order of 12 December 1987 and 11 December 1988 were on the face of it, valid, and there was no duty on D6 to question that validity. There was no plea as to the failure in carrying out any of the duties imposed on him by the Prisons Act and Prisons Rules 1979 which gives rise to a claim for damages, irrespective of any question of limitation. The only possible claim could be the failure to comply with O 3 of the ER 1962 in not informing the plaintiff of his right to object to the detention order. That has not been specifically pleaded but I would allow the amendment to add D6 only to the extent of his possible breach of that duty, subject to the defence of limitation.

The claim against D7

D7, was, on 10 October 1986, the Assistant Commissioner of the RBPF in charge of police operations. In para 22 of the PASC he is alleged to have unlawfully re-arrested the plaintiff in the garden of his (the plaintiff's) house on that date and caused him to be then unlawfully detained. Paragraph 23 then alleges that, during the course of such re-arrest, the plaintiff was threatened that he would be shot if he did not surrender. That caused him to take fright and fall which caused him severe injury. The plaintiff then alleges he was handcuffed by D7 or officers under his control. It is further alleged against D7 that following his re-arrest, the plaintiff was unlawfully mis-treated and refused medical treatment.

It is not challenged, at this stage, that from the expiration of the 28-day period contained in O 19 of the EO 1962, to the making of the first detention order on 11 December 1987, there is an arguable case that the plaintiff was unlawfully detained. The re-arrest of the plaintiff by D7 falls within that period. Therefore even if D7 was acting in what he considered to be the re-arrest of a person lawfully detained, his actions were unlawful. Whether the personal injuries suffered by the plaintiff can be sheeted home to D7, on the basis of the pleadings as they stand, it would seem to present difficulties but it is arguable. I consider that the plaintiff has made out an arguable case against D7, subject to the question of limitation.

The case against D8

D8 is alleged at all material times 'to be a member of the Royal Brunei Police Force and one of the officers in charge of the prison at the police headquarters' (para 9 of the PASC). Paragraphs 19 and 20 allege that on or about 9 October 1986, D8 told the plaintiff, with the intention of causing him physical harm, that he would be detained for 'from 20 to 30 years' as a result of which the plaintiff suffered nervous shock and deep depression. He then tried to escape and suffered the injuries complained of in relation to D7.

A I consider that, as pleaded, the claim against D8 cannot possibly succeed and he should not be joined. No further ground has been pleaded as to any duty of care owed by D8 to the plaintiff but even if there was, the alleged damage suffered is far too remote. The leading cases on remoteness of damage arising from an unlawful act state require that it must be reasonably forseeable (*The Wagon Mound* [1961] AC 388 and *Re Polemis* B [1921] 3 KB 560). I do not consider that the alleged actions of D8 could have reasonably been foreseen by him to even possibly cause the plaintiff to try to escape and to suffer the injuries that are alleged, quite apart from the question of limitation. There is no ground pleaded against D8 which, could render him liable for the plaintiff's detention.

C I do not consider a case has been pleaded against D8 which could succeed and the application to join him should be refused.

Limitation

I accept what Donaldson LJ said in *Ronex Properties Ltd v John Laing* D *Construction Ltd* [1983] QB 398, that a defence of limitation should not form the basis for an application to strike out unless 'in a very clear case'. If it is not such a clear case the defendant should plead and let the matter go to trial or seek the hearing of the question of limitation as a preliminary issue. Here the defendants say that the plaintiff's claim is clearly statute-E barred and the defendants should not be put to the expense in what could be lengthy proceedings, apart from the expense of the preparation for defending claims which cannot succeed but, if I was not convinced on that point, they do seek the hearing of the limitation defence as a preliminary issue. That is opposed by the plaintiff who says that it would not be possible to argue the question of limitation without having heard a great F deal of the evidence and made findings of fact on it. One of the questions raised, for instance, in relation to limitation is whether or not the plaintiff was under a 'disability' while he was detained. There are arguments on both sides on that point but these can only be resolved when the facts surrounding the detention are determined — such questions as visits by his G family who may or may not have been able to obtain legal advice and begin proceedings are very much in dispute.

I agree with the plaintiff's submission that this would not be a suitable case for a preliminary hearing. The factual basis would have to be established before the point could be argued.

H I then turn to the question as to whether the plaintiff's claim against each defendant is so clearly statute-barred so as to justify it being struck out, as the SR has found. Before the SR, and in the first written submissions made to me at the beginning of this hearing, the question of limitation was argued on the basis that the action, being commenced after the ELO 1991 came into effect was governed by the provisions of the ELO 1991. That I being so the period of limitation for claims founded in tort, which would include false imprisonment, was one of six years (s 6(1)). There was, however, argument on two aspects of when that period of six years should run. It was the plaintiff's contention that the period ran from the time all restrictions on the plaintiff were removed, ie 11 April 1990. I have already

said I consider that to be wrong and at best, the plaintiff could only argue that it was when he was released from detention, ie 11 April 1989. The plaintiff's argument that time did not run against him in respect of unlawful detention (or the other grounds of action) was that firstly an action for unlawful detention ran from the date of release, not the date the detention began, and secondly during his detention the plaintiff was under a 'disability' and he was entitled to rely on s 32(1) of the ELO 1991 which says that the period of limitation should not run until the 'disability' ceases. There was considerable argument on both aspects.

Strong reliance was placed by the plaintiff on the Australian decision in *Hawkins v Clayton* (1988) 164 CLR 539 where Deane J there said:

> It would, for example, be a travesty of justice and common sense if the law provided that a cause of action lay for damages for false imprisonment, but then went on to provide that that cause of action would be lost if the false imprisonment continued for six years after the cause of action first accrued ... . It is arguable that the notion of unconscionable reliance upon the provisions of the Statute of Limitations which provides the foundation of the long established equitable jurisdiction to grant relief in a case of concealment of a cause of action until after the limitation period has expired ... should, by analogy, be extended to cover cases such as these where the wrongful act at the one time inflicts the injury and, whilst its effect remains, preclude the bringing of an action for damages. It seems to me, however, that the preferable approach is to recognize that it could not have been the legislative intent that the effect of provisions such as (the NSW Limitation Act) should be that a cause of action for a wrongful act should be barred by a lapse of time during a period in which the wrongful act itself effectively precluded the bringing of proceedings. On that approach, the reference (the NSW Act) to the cause of action first accruing should be construed as to exclude any period during which the wrongful act itself effectively precluded the institution of proceedings.

That authority, it is argued, is supported by the very old English cases *Aldrich v Duke* [1686] Comd 26 GO ER 322 and *Fisher v Pearce* [1885] ILR G Dom 1. Some reliance is also placed on the provisions of the LA 1967 which, while providing for a one-year limitation for actions in false imprisonment, did specifically state that the period should run from the time when the wrongful imprisonment ends. On the question of the plaintiff being under a 'disability' until his release, the plaintiff contends that the court should place a liberal construction on that word and that if a person is detained without recourse to legal advice, he must be under a disability in bringing legal proceedings to secure his release. An example of such broad construction is to be found in the decision of Eastham J in *Pilmore v Northern Trawlers Ltd* [1986] 1 Lloyd's Rep 552, who held that an attack of dermatitis was a 'disability' under the Limitation Act 1986. This is clearly an extreme example and the author of *McGee on Limitation Periods* pours scorn on it. He considers that the list of disabilities set out in s 38 of the Limitation Act 1986 (infancy and unsoundness of mind) should be treated as exhaustive. That section corresponds with s 4(2) of the ELO 1991, on which the defendants rely and which the SR did consider exhaustive. It reads:

A (2) For the purpose of this order a person shall be treated as under a disability while he is an infant or of unsound mind.

Further authority relied on by the plaintiff is *Kirby v Leather* [1965] 2 All ER 441 where Lord Denning at p 444 thought that a disability is whether a person is 'capable of managing his affairs in relation to the action in B hand'. Further reliance is put on *Duncan v London Borough of Lambeth* [1968] All ER 84, per Donaldson J at p 92 and the New Zealand cases of *Metal Industries Ltd v Gensen* [1989] 1 NZLR 525 (a company in receivership) and *T v H* [1995] 3 NZLR 37 at 43. In that case Cooke P thought that a plaintiff's fear of bringing proceedings was 'disabling'. In the Canadian decision of *Scott v R* [1986] 3 CF 403 Joyal J considered that C 'incarceration in a foreign prison' might be a disability.

Having considered these authorities I am satisfied that both aspects (the aggregation of the periods of detention and the 'disability') are arguable and the plaintiff's claims for unlawful detention should not be struck out. The plaintiff's writ, having been filed within six years of his release from D detention, is within six years from that date.

I now however finally turn to consider an argument on limitation which was raised by leading counsel for the defendants at a late stage before me. It was not raised at all before the SR. It is that the LA 1967 provided that an action for false imprisonment was time-barred after one E year from the date of release from the alleged false imprisonment. This would have meant that the plaintiff's writ would have to have been filed on or before, at the latest, 11 April 1991 or, as I have held, 11 April 1990. It is the defendants' case that they had accrued rights under the LA 1967 to resist any action for false imprisonment and those rights cannot be taken from them except by very express and clear statutory provision. The F plaintiff says that that has been done by the specific wording of s 2 of the ELO 1991. That reads as follows:

2 (1) This order shall apply to any action commenced after the date of coming into force of this order, whether the cause of action accrued before or after that date.

G (2) Any action commenced before the date of coming into force of this order, shall continue in accordance with, and be bound by, the provisions of the Act repealed by s 52 of this order.

The plaintiff relies on that as being a clear statement that any action brought after the coming into force of ELO 1991 is to be governed by the H provisions of the order which allows for six years for a claim for false imprisonment even if the cause of action, as here, arose before that date. Even if the effect of that is to deprive the defendants of accrued rights, that can be done if the legislation clearly intends to do so, which it has done here. The defendants rely on the decision in *Yew Bon Tew v Kenderaan Bas Mara* [1982] 3 All ER 833 which was approved in *Arnold v Central* I *Electricity Generating Board* [1987] 3 All ER 694. In that case Lord Bridge, whose opinion was the only one delivered, approved the dicta of Lord Brightman in *Yew Bon Tew v Kenderaan Bas Mara* when he said:

> ... apart from the provisions of the interpretation statutes, there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right unless that result is unavoidable from the language used.

At p 704 Lord Bridge goes on to say that:

> I can find nothing in the language or discernable purposes of the statute which leads clearly, let alone, unavoidably to the conclusion that the defendants previously entitled to rely on the six year and one year time has under the original 1939 Act which the 1963 Act left intact were intended to be deprived of those accrued rights by the 1975 Act.

Strong reliance is also placed by the defendants on s 10 of the Interpretation and General Clauses Act (Cap 4) which provides that the repeal of any written law shall not affect any right acquired or accrued under the law so repealed. The relevant reads as follows:

> 10 The repeal of any written law shall not:
>
> (a) revive anything not in force or existing at the time at which the repeal takes effect;
>
> (b) affect the previous operation of any written law so repealed, or anything duly done or suffered under any written law so repealed;
>
> (c) affect any right, power, obligation, restriction or liability acquired, accrued, imposed or incurred under any written law so repealed;

I am satisfied from these authorities that the defendants here did have accrued rights in relation to an action against them for false imprisonment under the LA 1967 as soon as one year had passed after the plaintiff's release on 11 April 1989.

This question was exhaustively considered in *Yew Bon Tew v Kenderaan Bas Mara* [1982] 3 All ER 833. Of course in that case different legislation were considered but the principles emerging seem clear. At p 839 Lord Brightman said:

> It is a right which is not to be taken away by conferring on the statute a retrospective operation, unless such a construction is unavoidable. Their Lordships see no compelling reason for concluding that the respondents acquired no 'right' when the period prescribed by the 1948 Ordinance expired, merely because the 1948 Ordinance and the 1974 Act are procedural in character. The plain purpose of the 1974 Act, read with the 1948 Ordinance was to give and not to deprive; it was to give to a potential defendant, who was not on 13 June 1974 possessed of an accrued limitation defence, a right to plea such a defence at the expiration of the new statutory period. The purpose was not to deprive a potential defendant of a limitation defence which he already possessed. The briefest consideration will expose the injustice of the contrary view. When a period of limitation has expired, a potential defendant should be able to assume that he is no longer at risk from a stale claim. He should be able to part with his papers if they exist and discard any proofs of witnesses which have been taken, discharge his solicitor if he has been retained, and order his affairs on the basis that his potential liability has gone. That is the whole purpose of the limitation defence.

Is there then a reasonable way in which s 2 of the ELO 1991 can be construed so as not to remove from the defendants their accrued rights of limitation under the LA 1967? In my view there clearly is. It is by no means unreasonable to construe the purpose and effect of s 2(1) as providing that where an action is commenced after the coming into force of the ELO 1991 if a period of limitation has not expired it shall be extended to the time limit provided by the ELO 1991 but that does not mean to say that where a period has expired it shall be revived and so extended. The order does not say so specifically but I am satisfied that it must be so specific if the defendants are to be deprived of their accrued rights. Section 6 of the ELO 1991 provides the provision that one would expect in that it shall govern actions commenced after it comes into force even if the cause of action arose before that date as would inevitably be the case for a period after that date. That is not, in my view, sufficient to construe that the order is also saying that the rights of action which were time-barred before the ELO 1991 came into force shall be revived if the order extends the period of limitation.

Taking into account these authorities and s 10 of the Interpretation and General Clauses Act (Cap 4), I consider that is beyond argument and that the plaintiff's claim for a false imprisonment against all defendants is clearly time-barred.

The plaintiff's claim based on negligence against all defendants

This claim is contained in paras 46–48 of the PASC. It is very widely worded and it is not easy to understand what allegations of negligence are made against the respective defendants. However all of them are said to owe a duty to the plaintiff to investigate and verify the allegations made against him to see if there were adequate grounds for his arrest and detention, refusing to allow him to contact his family or legal advisers, failing to inform him of his rights, failing to apologize for his detention, failing to tell him the reasons for his detention, ratifying and authorizing his ill-treatment and failing to afford the plaintiff proper medical treatment. D1, D2, D5, D6, D7 are alleged to have been negligent in ordering or ratifying the detention and mistreatment of the plaintiff.

The defendants say that such claims based on negligence must fail as being wrong in principle, far too vague and in any event time-barred. It is the defendants' case that as police officers or a minister, the defendants owe no duty of care towards the plaintiff. The allegations made are far too broad for them to be called to defend them and that s 15 of the ELO 1991 makes the claim in negligence time-barred. That order so far as is relevant reads as follows:

> (1) This section applies to any action for damages for negligence ... or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a written law or independently of any contract or any such provision) where the damages claimed by the plaintiff for negligence ... or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.

(2) None of the time limits in the preceding provisions of the ELO 1991 shall apply to an action to which this order applies.

(4) ... the period applicable is three years from:

(a) the date on which the cause of action accrued; or

(b) the date of knowledge (if later) of the person injured.

The defendants cite *McGee on Limitation Periods* on this aspect. At pp 55–56 the author says:

> Mixed causes of action. First, the special personal injury rules apply to cases where the damages claimed consist of or include damages for personal injuries ('PI'). Therefore, an action in which the plaintiff wishes to claim damages for personal injury and for some other cause of action must be brought within the period provided for personal injury actions. If that period has expired, an action may still be brought for the other items of damage, since the personal injury rules will not apply if the damages claimed do not include anything in respect of personal injuries.

Apart from the allegations of assault or neglect causing personal injury, the allegation of negligence seems to be that the defendants failed to exercise a duty of care towards the plaintiff in arresting him and holding him in detention. The authorities on this aspect relied on by the defendants are *Hill v Chief Constable of West Yorkshire* [1989] AC 53 ('the Yorkshire Ripper case') per Lord Keith and *Elguzouli-Daf v Commissioner of Police & Anor* [1995] 1 All ER 833 and the cases referred to therein.

An action for negligence must be brought within three years of the cause of action arising. Even if the plaintiff's argument on 'disability' is right, a claim based on negligence was time-barred to three years from the date of the plaintiff's release, ie 11 April 1992 — well before the date of the filing of his writ. There only remains the claim in negligence against D5 and D6 for failing to advise the plaintiff of his right to object to the detention orders pursuant to the provisions of the EO 1962. I am satisfied that such failure could only result not in the order themselves being invalid but that the plaintiff had an arguable cause of action for negligence in not being advised of his rights. I am however satisfied that such a cause of action had to be brought within, at most, three years of the plaintiff's release from detention, which was not done.

I do take into account that here the plaintiff says there was a close relationship between him and D5 and D6 in that they were his jailors but I am satisfied that the cause of action for negligence whereby the plaintiff was unlawfully detained (not being advised of his right to object) or causing personal injury, are both barred by the ELO 1991.

Personal injuries/assault and battery

There are allegations made against D5, D6, D7 and D8 that they caused the plaintiff to suffer personal injuries either deliberately or through neglect of their duty towards him. I am satisfied that again any such claim is statute-barred by s 15 of the ELO 1991 and could not succeed. Accordingly

A D5, D6 and D7 should not be joined. The same consideration would apply to D8 if a sufficient case had been pleaded against him.

Section 40 of the Emergency (Limitation) Order 1991

Section 40 of the ELO 1991 provides that the court may extend the
B limitation period in any case if it considers that it would be equitable to allow the action to proceed, having regard to the degree to which ss 15 and 16 of the ELO 1991 would prejudice the plaintiff. The court must consider any prejudice which the defendants may suffer by allowing the action to proceed.

C The plaintiff here says that there will be no substantial prejudice to the defendants by allowing his action to proceed and that the reasons for the delay, which is one of the factors to be considered, have been set out in the plaintiff's supporting affidavit. The SR was plainly wrong to say that no explanation for the delay was given. The reasons were substantially that until settlement of his libel action in Singapore he did not have funds and
D he could not obtain legal advice or assistance in Brunei and he wanted to be assured that the proposed action would not offend His Majesty The Sultan.

The defendants argue that s 40 clearly should be limited to claims for personal injury and that in any event the explanations given for the very
E substantial delay are not enough to justify any extension of time. The defendants will be severely prejudiced by the delay as memories of events fade. The SR was right to refuse to use her discretion under s 40. I agree with that submission. While one can appreciate the difficulties experienced by the plaintiff, I am satisfied that firstly s 40 should only apply to actions for personal injuries and accordingly the claim was filed long after those
F causes of action arose and secondly I do not consider that the reasons advanced to explain that delay are sufficient to over-ride the inevitable prejudice to the defendants.

The appeal is accordingly refused.

G *Costs*

In refusing to allow this appeal I have reached that decision on a somewhat different basis from that found by the SR, in particular, in the reasons for deciding that the detention orders could not be challenged. I have found that on the arguments before her the claim against D1 and D2 for the
H period during which there was no detention order should not have been struck out as there was an arguable case on the arguments before her, that that claim was not time-barred. I have however found that it was time-barred but on a ground only raised before me at the last moment. There has not been an opportunity to hear argument on the question of costs in the light of my finding, but I will make an order nisi that the plaintiff is to
I have his costs against D1, D2, D5, D6 and D7 of the application before the SR but there is to be no order for costs in the hearing before me. So far as D3, D4, and D8 are concerned, they are entitled to their costs before

the SR and before me. All costs are to be taxed if not agreed. All parties are to have liberty to apply within 21 days for a variation of my order for costs. I will consider written argument in support of such an application.

Like the SR I am also most grateful for the full and meticulous way the matter has been argued on both sides and for the very helpful written submissions made.

Appeal dismissed.

Reported by Kanesh Sundrum